

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Implementation of the Pay Telephone)
Reclassification and Compensation)
Provisions of the)
Telecommunications Act of 1996)

CC Docket No. 96-128

**COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES**

The Association of Communications Enterprises (“ASCENT”),¹ through undersigned counsel and pursuant to Section 1.429 of the Commission’s Rules,² hereby offers the following comments on petitions for reconsideration and or clarification of the *Fourth Order on Reconsideration and Order on Remand, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 98-128, FCC 02-22 (rel. Jan. 31, 2002) (the “Order”) filed in the above-referenced proceeding.³ Specifically, ASCENT urges the Commission to reject Sprint’s erroneous conclusion the resale telecommunications carriers have been spared by the Commission from pay telephone compensation obligations when in fact their contributions already have been made indirectly,

¹ ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. The largest association of competitive carriers in the United States, ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services.

² 47 C.F.R. § 1.429.

³ Petitions for reconsideration and/or clarification have been filed by the American Public Communications Counsel (“APCC”), the RBOC Payphone Coalition, WorldCom, Inc. (“WorldCom”) ITC^DeltaCom Communications, Inc. (“ITC^DeltaCom”), and Sprint Corporation (“Sprint”).

through wholesale carrier rates designed specifically to permit underlying facilities-based carriers to recover the costs of compliance with Section 276 with respect to payphone originated toll-free and access code calls completed to resale carrier end-user customers. Section 276 contains no requirement that only a direct payphone compensation obligation will satisfy the Congressional directive that PSP must be compensated for “each and every completed intrastate and interstate call using their payphone”⁴ and none should be read in gratuitously. Indeed, facilities-based carriers such as Sprint have implicitly recognized the lack of such a direct compensation requirement in Section 276 and have guarded against the concomitant risk that the Commission’s revised interim compensation plan might require remittance of PSP compensation on behalf of not only themselves but also their resale carrier customers. They have done so by acting specifically to recover from their resale carrier customers revenues necessary to satisfy the payphone compensation obligations relating to resale carrier toll-free and access code calls. Having collected -- and received the financial benefit for a number of years from -- PSP compensation from resale carriers, it is neither inequitable nor inconsistent with Section 276 for the Commission to require carriers such as Sprint to now remit that collected revenue to PSPs as rightful compensation for interim period payphone-originated calls.

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47 U.S.C. § 276(b)(1)(A).

In its petition, Sprint, among other things, objects to the Commission's determination "to omit resellers from a direct payment obligation for interim compensation".⁵ Sprint's objection is apparently premised upon the erroneous assumption that by exempting resale carriers from a *direct* payment obligation, the Commission has effectively eliminated the pay telephone compensation obligation of such carriers for the interim compensation period; i.e., November 7, 1996 through October 6, 1997. This is an incorrect assumption. As demonstrated below, resale carriers have already contributed to pay telephone compensation for the interim period, having done so as they had done so in the period prior to passage of the 1996 Act, -- as a component of the service rates they have paid their underlying carriers. If the Commission were to impose a separate *direct* compensation obligation upon resale carriers now, these carriers and none others would be subject to a double compensation obligation. Clearly, this would constitute precisely the type of "unlawful shift of responsibilities of one class of carrier or service provider to another"⁶ which Sprint deems impermissible pursuant to Section 276.

⁵ *Order*, ¶ 18.

⁶ Sprint Petition for Reconsideration and Clarification, p. 2.

Prior to passage of the 1996 Act, the Commission's Rules required the payment of compensation to payphone service providers ("PSPs") on a monthly per-phone basis, with compensation paid proportionately by all IXC's with annual revenues in excess of \$100 million. For the interim compensation period, that one-year period provided by the Commission during which contributing carriers would make such modifications to existing systems to enable them to move to a per-call compensation scheme after that time, this pre-1996 Act was in large measure carried forward. In the Commission's first payphone *Report and Order*, for example, the Commission determined that "PSPs should be paid monthly compensation on a flat rate by IXC's with annual toll revenues in excess of \$100 million, beginning on the effective date of the rules adopted in this proceeding and ending one year later."⁷ Thus, carriers such as Sprint with annual toll revenues in excess of \$100 million know that they would be required to continue compensating PSPs on a monthly per-phone basis. Since compensation was based upon annual toll revenues, such carriers obviously continued to recover the payphone compensation amounts attributable to revenues generated by their resale carrier customers as had been done prior to the effective date of the payphone compensation rules: i.e., these costs of doing business continued to be recovered by such IXC's as a component of the wholesale rates charged their resale carrier customers.

The above monthly per-phone compensation rule applicable to IXC's with annual toll revenues in excess of \$100 million remained in effect until vacated by the Court of Appeals for the District of Columbia Circuit in *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) in July of 1997. The Court of Appeals remanded for further consideration by

⁷ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation (Report and Order), 11 FCC Rcd. 20541 (1996) ("*First Report and Order*"), ¶ 119.

the Commission, noting that “the FCC acted arbitrarily and capriciously in requiring payments only from large IXC’s – those with over \$100 million in toll revenues – for the first phase of the interim plan. . . . Administrative convenience cannot possibly justify an interim plan that exempts all but large IXC’s from paying for the costs of services received.”⁸

⁸ Illinois Public Telecommunications Association v. FCC, 117 F.3d 555, 565 (D.C. Cir. 1997).

The *Order* fully remedies the shortcomings perceived by the Court of Appeals. As the Commission makes clear, “[u]pon further consideration of the language of the *Illinois* decision and the comments submitted on this issue after the court’s remand, we conclude that the duty to pay interim compensation should not be limited to carriers with annual toll revenue about \$100 million, but should include all IXC’s, as well as LEC’s to the extent that LEC’s receive compensable payphone calls.”⁹ Sprint takes issue, however, with the separate determination set forth in the *Order* that “the Commission decides to omit resellers from a direct payment obligation for interim compensation.”¹⁰ Contrary to Sprint’s opinion, however, this second determination by the Commission is not inconsistent with the *Illinois* decision.

As noted above, the resale carrier customers of carriers with annual toll revenues in excess of \$100 million have already paid their underlying service providers the payphone compensation which is attributable to the revenues which such resale carriers have generated for their underlying facilities-based carriers. Not only was this cost of doing business recovered by \$100 million + IXC’s prior to the 1996 Act, the practice continued unabated through at a very minimum three-quarters of the interim period since the Rule was not remanded to the Commission by the Court of Appeals until that time. In practice, this method of payphone compensation recovery did not cease following remand by the Court of Appeals. ASCENT’s resale carrier members did not experience any decrease in rates attributable to a policy switch by their underlying carriers. Indeed, ASCENT is not aware of a single instance in which a resale carrier was advised by an underlying carrier that its rates were being proportionately reduced because the underlying carrier would no

⁹ *Order*, ¶ 17.

¹⁰ *Id.*, ¶ 18.

longer be recovering payphone compensation costs from the resale carrier; in essence, then, this recovery mechanism continued through the totality of the interim compensation period.

Thus, it is clear that as resale carriers have already contributed their proportionate share of payphone compensation to their underlying facilities-based carriers, and those underlying carriers have had the benefit of such payments for more than five years (and it cannot credibly be argued that requiring disgorgement of these retained payments to PSPs constitutes either a hardship or an inequitable result). It is equally clear that the Commission is well within its authority to direct the entities which have collected and retained such revenue for a number of years to fulfill the purpose of Section 276 by transferring those amounts, as set forth in the *Order*, to PSPs.

In formulating its revised interim compensation plan, the Commission has been mindful of the benefits of increased administrative efficiency and lower costs which result from declining to impose a direct payment obligation on resale carriers.¹¹ However, the Commission's decision was obviously based upon more than mere administrative efficiency. As the *Order* also notes, "[t]he elimination of resellers from a direct payment obligation should eliminate some of the non-payment problems"¹² which would otherwise undercut the effectiveness of Section 276. Sprint obviously places little importance on such concerns. However, just as the Commission may "exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest [and] may take into account considerations of hardship, equity, or more effective implementation of overall policy,"¹³ it may also, and indeed should, take such

¹¹ See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Report and Order), 11 FCC Rcd. 20586 (1996), ¶ 86.

¹² Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Fourth Order on Reconsideration and Order on Remand), CC Docket No. 96-128 (2002), ¶ 18.

¹³ Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carriers Association, Inc.; Petition for Limited Waiver of 47 C.F.R. § 54.702(f) Regarding Audit Report Deadline (Order), CC Docket No. 96-45 (rel. March 1, 2002), ¶ 6.

considerations into account when formulating a rule as an initial matter. In recognizing, and choosing to eliminate, the administrative burdens which would otherwise flow from imposition of a direct payment obligation on resale carriers, while simultaneously minimizing the potential for nonpayment of PSP compensation, the Commission has done just that.

Thus, under its revised interim compensation plan, the Commission has fully effectuated Section 276's "three basic policy objectives with respect to the provision of payphone services: (1) promoting a competitive payphone market; (2) ensuring the widespread deployment of payphones for the benefit of the general public; and (3) ensuring that providers of payphone services receive fair compensation for every call made using their payphones."¹⁴ And it has done so not only without sacrificing administrative efficiency, but also without imposing an effectively duplicative payment obligation on resale carriers. It would be inappropriate for the Commission to alter this result at the request of Sprint or any other facilities-based carrier. Accordingly, the Commission

¹⁴ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Third Report and Order), 14 FCC Rcd. 2545 (1999), ¶ 1.

should reject Sprint's request and refrain from modifying the revised interim compensation plan set forth in the Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Catherine M. Hannan, do hereby certify that a true a correct copy of the foregoing
Comments of the Association of Communications Enterprises has been served by the First Class
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